No. 87-6700

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In The

Supreme Court of the United States

October Term, 1989

JOHN HENRY SELVAGE,

Petitioner,

vs.

JAMES LYNAUGH, Director, Texas Department of Corrections,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

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February 11, 1980 –	Jury findings entered requiring imposition of sentence of death, *State v. John Henry Selvage* (same case)
March 12, 1980 –	Judgment of guilt and sentence of death entered, *State v. John Henry Selvage* (same case)
January 22, 1988 –	Petition for Writ of Habeas Corpus filed, *Selvage v. Lynaugh*, No. H-88-166, United States District Court for the Southern District of Texas
March 14, 1988 –	Order recommending denial of application for writ of habeas corpus, *Ex parte John Henry Selvage*, No. 305495-B, District Court of Harris County, Texas, 230th Judicial District
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CAUSE NO. 305,495

THE STATE OF TEXAS	IN THE DISTRICT COURT
VS.	OF HARRIS COUNTY, TEXAS
JOHN HENRY SELVAGE	230TH JUDICIAL DISTRICT
	FEBRUARY TERM, A.D. 1980

MEMBERS OF THE JURY:

By your verdict returned in this case you have found the defendant guilty of the Offense charged in the indictment, that is, capital murder, which was alleged to have been committed in Harris County, Texas, on or about the 30th day of July, 1979.

You are instructed that the punishment for capital murder is by death or confinement in the penitentiary for life.

In connection with your consideration of the evidence presented with respect to the assessment of punishment, I am submitting to you certain issues to be determined by you in accordance with instructions which I shall also give you. The State must prove each issue submitted beyond a reasonable doubt, and you shall return a special verdict of "Yes" or "No" on each issue submitted.

You are not to discuss among yourselves how long the accused would be required to serve the sentence that you impose. Such matters come within the exclusive jurisdiction of the Board of Pardons and Paroles and the Governor, and are no concern of yours.

You are further instructed that you may not answer any issue "Yes" unless you agree thereon unanimously;

and you may not answer any issue "No" unless ten (10) or more jurors agree.

ISSUE NO. 1

Do you find from the evidence beyond a reasonable doubt whether the conduct of the defendant, John Henry Selvage, that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

ANSWER: Yes

ISSUE NO. 2

Do you find from the evidence beyond a reasonable doubt whether there is a probability that the defendant, John Henry Selvage, would commit criminal acts of violence that would constitute a continuing threat to society?

ANSWER: Yes

/s/ Joe Kegans
JOE KEGANS, JUDGE PRESIDING
230TH DISTRICT COURT
HARRIS COUNTY, TEXAS

VERDICT

We, the Jury, return in open court the above answers as our answers to the issues submitted to us and the same is our verdict in this case.

/s/ Joe M. McDaniel
FOREMAN OF THE JURY

Filed: February 11, 1980

305495
No. 300,503

(Caption omitted in printing)

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
230TH JUDICIAL DISTRICT
FEBRUARY TERM, A. D. 1980

DEFENDANT'S MOTION TO INSTRUCT JURY

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the Defendant JOHN HENRY SELVAGE, who asks this Court to instruct the jury that under the present state of the law of the Texas Penal Code and the Court of Criminal Procedure that they cannot convict an individual of capital murder if they find that that individual was only a party to the transaction and not the actual "trigger man".

I.

Your Defendant would show this honorable court that the legislature in the inactment (sic) of the capital murder statue (sic) never intended for the law to apply to parties, but only to "trigger man".

The Defendant would further urge that the court consider the attached affidavits from members of the Legislature, plus any other evidence introduced on the witness stand through members of the Texas Legislature.

Respectfully submitted,

DENNIS B. KELLY
ATTORNEY FOR DEFENDANT

JOHN EMMETT CROW
ATTORNEY FOR DEFENDANT

Filed: February 8, 1980

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PETITION FOR WRIT OF HABEAS CORPUS
PURSUANT TO 28 U.S.C. § 2254

Prisoner's Name:	JOHN HENRY SELVAGE
Prisoner's Number:	DR 652
Place of Confinement:	Ellis I Unit, Texas Department of Corrections

JOHN HENRY SELVAGE, Petitioner, v. JAMES LYNAUGH, Director, Texas Department of Corrections, Respondent.	:	No. H-88-166

To the Honorable Judge of the United States District Court for the Southern District of Texas: Petitioner JOHN HENRY SELVAGE prays for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 and in support of his request sets forth the following:

HISTORY OF PRIOR PROCEEDINGS

1. The District Court of Harris County, Texas, 230th Judicial District, in and for Harris County, entered the judgment under attack.

2. Mr. Selvage was indicted on December 4, 1979, for the capital murder of Albert Garza.

3. Mr. Selvage entered a plea of not guilty.

4. Mr. Selvage was tried before a jury on February 4-8, 1980. On February 8, 1980, the jury returned a verdict of guilty of capital murder.

5. Mr. Selvage did not testify at either stage of his trial.

6. The sentencing proceedings were conducted on February 8-11, 1980. On February 11, 1980, the jury returned a verdict affirmatively answering the two sentencing issues presented to them.

7. In accordance with the jury's verdict, on March 12, 1980, Mr. Selvage was adjudicated guilty and sentenced to death.

8. The Texas Court of Criminal Appeals affirmed the conviction and sentence on July 11, 1984. *Selvage v. State*, 680 S.W.2d 17 (Tex. Crim. App. 1984). Rehearing was denied on October 10, 1984. *Id.*

9. Mr. Selvage did not file a petition for writ of certiorari in the Supreme Court of the United States.

10. In addition to his direct appeal, Mr. Selvage has filed the following petitions, applications, and motions with respect to the conviction and sentence challenged herein:

(a) After the affirmance by the Texas Court of Criminal Appeals, counsel for Mr. Selvage filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Texas.

(b) The District Court denied habeas corpus relief without an evidentiary hearing on October 6, 1986.

Counsel for Mr. Selvage had moved his office without notifying the clerk's office or the Court, and therefore did not receive notice of the order until October 23, 1986. He then notified Mr. Selvage by letter that he would no longer represent him. He did not file a notice of appeal, did not inform Mr. Selvage of the deadline for filing a notice of appeal, and did not move to withdraw from the case nor otherwise inform the Court that he no longer wished to represent Mr. Selvage.

(c) Mr. Selvage was not able to obtain new counsel until February 20, 1987. On February 27, new counsel filed a Motion to Alter or Amend the Judgment under Rule 60 of the Federal Rules of Civil Procedure. He also requested permission to file an amended petition for writ of habeas corpus. On March 4, 1987, the District Court denied the motion to amend the petition, but vacated its prior judgment, readopted its order denying habeas corpus relief, and granted a certificate of probable cause to appeal.

(d) On March 3, 1987, Mr. Selvage filed a State Application for Writ of Habeas Corpus in the District Court for the 230th Judicial District, Harris County, Texas. His application was denied the same day.

(e) On March 6, 1987, in an unreported opinion, the Texas Court of Criminal Appeals adopted the trial court's decision denying relief. *Selvage v. Lynaugh*, CCA No. 16884-01 (March 6, 1987).

(f) On July 23, 1987, the United States Court of Appeals for the Fifth Circuit affirmed the denied (sic) of federal habeas corpus relief. *Selvage v. Lynaugh*, 823 F.2d 845 (5th Cir. 1987).

(g) The Supreme Court of the United States denied a petition for writ of certiorari on October 2, 1987. *Selvage v. Lynaugh*, ___ U.S. ___, 98 L.Ed.2d 268 (1987).

(h) *Mr. Selvage's execution is presently scheduled for January 27, 1988 (after midnight January 26, 1988). No stay of execution is in effect.*

GROUNDS FOR HABEAS CORPUS RELIEF

* * *

III.

TEXAS' CAPITAL SENTENCING PROCEDURE GENERALLY, AND THE INSTRUCTIONS GIVEN TO THE JURY IN THIS CASE SPECIFICALLY, DO NOT ALLOW FOR THE CONSIDERATION OF EVIDENCE IN MITIGATION PROFFERED BY THE DEFENSE AS THE BASIS FOR A SENTENCE LESS THAN DEATH, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND SIMILAR PROVISIONS OF THE TEXAS CONSTITUTION.

18. At the penalty phase of Mr. Selvage's trial, each side offered additional evidence supporting its view of the appropriate sentence. As described in detail in Ground II, the state offered evidence of prior convictions and unadjudicated criminal activity. The state brought this evidence before the jury to support its claim that Mr. Selvage deliberately murdered the victim in this case, and would commit dangerous criminal acts in the future.

19. The defense offered evidence to mitigate or lessen the jury's resolve to resort to the ultimate penalty. Audrey Picou, Mr. Selvage's older sister, testified and

described his upbringing. She told the jury that he had been raised in a very close, religious family, and unlike other children they knew, had been exposed to the arts and music. R. 2895-2912. During his school years, she described Mr. Selvage as being an "A" and "B" student. *Id.* Throughout his early and school years, Mrs. Picou testified that he was a happy, normal child.

20. In 1968, she recalled, Mr. Selvage was drafted into the Army. When he was discharged not quite two years later, he came back a different person. In her terms "he came back in a straightjacket." R. 2910. He had become addicted to heroin and spent several months in Army hospital treatment centers. When he finally returned to New Orleans, he was not able to work for a period of time, but later found work at a gas station.

21. She testified further that she had never seen Mr. Selvage exhibit violent behavior and opined that he was a peaceful person. This was consistent with their family, she said: no other family member had ever been arrested. She also opined that Mr. Selvage had the strength of character to be rehabilitated.

22. The defense also called Dr. Jose Garcia, Chief of Mental Health Services for the Texas Department of Corrections. R. 2924. Dr. Garcia described in detail the numerous rehabilitative programs offered by the Department of Corrections to inmates.

23. After both sides rested, the defense asked that the court instruct the jury that if it found that Mr. Selvage was not the triggerman, it must return a life sentence. The trial court denied this request. R. 2937.

24. The trial court's sentencing charge thereafter was cryptic and made no mention of Mr. Selvage's mitigating evidence. Instead, it focused almost exclusively upon special issues 1 and 2:

> MEMBERS OF THE JURY: By your verdict returned in this case you have found the Defendant guilty of the offense charged in the indictment, that is, Capital Murder, which was alleged to have been committed in Harris County, Texas, on or about the 30th Day of July, 1979.
>
> You are instructed that the punishment for capital murder is by death or confinement in the penitentiary for life.
>
> In connection with your consideration of the evidence presented with respect to the assessment of punishment, I am submitting to you certain issues to be determined by you in accordance with instructions which I shall also give you. The State must prove each issue submitted beyond a reasonable doubt, and you shall return a special verdict of "Yes" or "No" on each issue submitted.
>
> You are not to discuss among yourselves how long the accused would be required to serve the sentence that you impose. Such matters come within the exclusive jurisdiction of the Board of Pardons and Paroles and the Governor, and are no concern of yours.
>
> You are further instructed that you may not answer any issue "Yes" unless you agree thereon unanimously; and you may not answer any issue "No" unless ten (10) or more jurors agree.

> ISSUE NO. 1
>
> Do you find from the evidence beyond a reasonable doubt whether the conduct of the defendant, John Henry Selvage, that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> ANSWER: _____
>
> ISSUE NO. 2
>
> Do you find from the evidence beyond a reasonable doubt whether there is a probability that the defendant, John Henry Selvage, would commit criminal acts of violence that would constitute a continuing threat to society?
>
> ANSWER: _____

R. 111-112.

25. This instruction failed to provide the jury with the constitutionally necessary opportunity to consider, and determine Mr. Selvage's sentence on the basis of considering, the mitigating evidence. The charge failed to provide the jury with a definition of the concept of mitigation, and further failed to charge the jury that it must consider such evidence. For these reasons alone, the instruction precluded an individualized sentencing determination.

26. The charge also failed to provide the jury with the means to act upon the mitigating evidence it heard if it reached the conclusion that the mitigating evidence called for a sentence less than death.

(a) The only two issues which the court's charge permitted the jury to consider are really aggravating circumstances: whether the crime was committed deliberately to cause death, and whether there exists a possibility that the defendant would commit additional criminal acts of violence in the future.

(b) The wealth of life history evidence presented on behalf of Mr. Selvage demonstrated that he was a person of value whose unfortunate addiction to drugs had led to his involvement in the crime, but who, for this very reason, could be forgiven, to the extent of sparing his life, for his involvement in the crime.

(c) The jury was not informed that this mitigating evidence might be considered as bearing upon the two special issues, to which it was not self-evidently relevant, nor that it might bear independently upon the choice of sentence. The jury was told only to answer the two special issue questions yes or no. Accordingly, neither through these verdicts nor outside of them could the jury voice its view of the effect, if any, that it thought the mitigating evidence should have. As the Fifth Circuit has recently described this problem in another case,

> The jury was allowed to hear all evidence that might mitigate the culpability of [the petitioner's] deeds or his person. The jury could then consider (*i.e., think about*) the bearing of all of the evidence, aggravating and mitigating, upon the ultimate question of whether [petitioner] should be put to death. If, however, that consideration should lead the jury to decide against the death sentence, how is the decision given effect and incorporated into the verdict? No interrogatory asks about that most crucial decision. Having said that it was a deliberate murder and that [petitioner] will be a continuing threat, the jury can say no more.

Penry v. Lynaugh, 832 F.2d 915, 920 (5th Cir. 1987).

(d) The Constitutions of Texas and the United States cannot tolerate such a sentencing scheme: they require that the jury be free to consider and act upon such evidence so as to impose a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586 (1978).

IV.

IN FAILING TO EXPLICITLY PROVIDE A MEANS BY WHICH THE JURY COULD CONSIDER AND GIVE INDEPENDENT MITIGATING WEIGHT TO MITIGATING EVIDENCE, THE TEXAS CAPITAL SENTENCING PROCEDURE PRECLUDED THE PRESENTATION OF ADDITIONAL MITIGATING EVIDENCE ON BEHALF OF MR. SELVAGE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND SIMILAR PROVISIONS OF THE TEXAS CONSTITUTION

27. Mr. Selvage is psychotic now and has suffered continually from severe psychosis since at least 1970. In 1979, when he participated in the commission of the robbery that led to the homicide herein, Mr. Selvage was psychotic. His psychosis vitiated, or at least substantially diminished, his responsibility for the crime. However, the jury did not know this, because no evidence of Mr. Selvage's mental illness was presented at his trial.

28. This evidence was not presented because trial counsel, in reasonable reliance upon the statute's limitation, forewent substantial investigation, presentation and

argument of this compelling mitigating evidence. He forewent those essential functions of defense counsel in a capital case because Texas' capital sentencing scheme precluded consideration of Mr. Selvage's illness as mitigating evidence in the circumstances of his case. If presented, this evidence would have assisted the *state* in proving that the homicide was committed deliberately and that there was a possibility that Mr. Selvage would be violent in the future. Notwithstanding this, the very same evidence would also have weighed heavily in favor of a life sentence. However, the jury would have had no means through which to give effect to the *mitigating* weight of this evidence, for upon giving the evidence aggravating weight – which it would have been constrained to do – the jury's "consideration" of this evidence would have mandated the death sentence. For this reason, the Texas capital sentencing procedure constrained defense counsel not to present, *i.e*, precluded the presentation of, evidence of Mr. Selvage's severe mental illness. Mr. Selvage's rights to the effective assistance of counsel and to an individualized sentencing determination were violated in the process.

29. By the time Mr. Selvage participated in the robbery that led to the homicide herein, he had suffered the debilitating symptoms of psychosis for almost a decade.

(a) In April, 1970, Mr. Selvage was medically discharged from the Air Force, because he was beginning to suffer from psychotic symptomatology. The examination which precipitated this discharge revealed the following:

> *INTRODUCTION*: This 19-year old A1C single Negro male was admitted to the psychiatric

> ward after being seen in the emergency room as the patient rammed his fist through a window in an attempt to catch the people that he thought were "spying" on him.
>
> *HISTORY PRESENT ILLNESS*: The patient stated he has been in the service for approximately 16 months; the last nine months here at Clark. He stated his difficulties started about two months ago in that he had trouble concentrating on the job and his supervisor "got mad at him." His supervisor sent him to the mental health clinic for an evaluation; however, before an appointment could be made, he was brought in as an "emergency" on Jan 29, 70 by his first sergeant as the patient had allegedly stated he was going to kill his supervisor. He was evaluated by Sgt. Carpenter in the Mental Health Clinic and felt to be depressed as well as having borderline mental deficiency, (WAIS full scale score of 78). He was scheduled to see the psychiatrist for the possibility of a 39-12 discharge; however, on 6 Feb he was seen in the emergency room after he rammed his fist through a window. Psychiatric consultation was obtained and he was admitted to the psychiatric ward. On admission the patient explained that he and his supervisor had been having multiple disagreements. He stated that his supervisor believed him to be on drugs because the patient had difficulty in performing his duties at work. He stated that he has felt people were watching him everywhere on base. He also admitted hearing whispering voices at night over the past few weeks and he felt that these voices were talking about him. The patient stated that these things ;[sic] were very disturbing to him and he had difficulty sleeping at night and performing his duties at work.
>
> * * *
>
> *MENTAL STATUS EXAMINATION*: The patient is oriented x3 spheres. His affect was blunted.

> His associations intact. The mood was that of depression and apathy. Suicidal ideation were denied. The patient admits to frequent ideas of reference occurring over the past several weeks and there is [sic] several episodes of questionable auditory hallucinations, i.e. "whispering voices", occurring several nights prior to his hospitalization. These have subsided since he has been hospitalized. The patient is essentially non-verbal and is of borderline intelligence.

Appendix A (submitted herewith).

(b) In this report alone, Mr. Selvage exhibited six of the recognized symptoms of a severe form of psychotic illness, paranoid schizophrenia, including

> auditory hallucinations in which either a voice keeps up a running commentary on the individual's behavior or thoughts, or two or more voices converse with each other[;]
>
> auditory hallucinations on several occasions with content of more than one or two words, having no apparent relation to depression or elation[;]
>
> marked poverty of content of speech if associated with . . . blunted . . . affect [;]
>
> marked impairment in role functioning as wage-earner[;]
>
> odd or bizarre ideation, or magical thinking, e.g., . . . ideas of reference [;] [and]
>
> unusual perceptual experiences, e.g. recurrent illusions, sensing the presence of a force or person not actually present[.]

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 188-90 (3d ed. 1980) ("DSM-III").

(c) Thereafter, when Mr. Selvage was incarcerated on a federal criminal conviction in the latter half of the 1970's Bureau of Prisons mental health personnel diagnosed him in accord with these symptoms, as suffering from "paranoid schizophrenia." Appendix B. Even though Mr. Selvage's Bureau of Prisons medical records appear to be incomplete in some respects, those records document the Bureau's finding that Mr. Selvage suffered from paranoid schizophrenia or some other psychotic disorder from at least January, 1977 until his release in late 1978. Beginning in January, 1977 and continuing until his release, Mr. Selvage was given daily therapeutic doses of Thorazine, a drug used in the treatment of severe psychotic illness. Appendix B.

30. In December, 1987 and again in January, 1988, Mr. Selvage was examined by Dr. James R. Merikangas, an experienced and highly-qualified practicing psychiatrist who serves as well as a professor of psychiatry at the Yale University School of Medicine. *See* Appendix C (curriculum vitae of Dr. Merikangas). On the basis of Mr. Selvage's documented history of psychosis and his own recent examination of Mr. Selvage, Dr. Merikangas concluded that Mr. Selvage still suffers from a psychotic illness and is presently quite psychotic:

> In summary, John Selvage is a man with a well-documented history of psychosis from at least 1969 or 1970. He sustained a severe head injury which in a chart is referred to as a skull fracture in late 1975 or early 1976 and was placed on Dilantin. The Dilantin has been given to him by prison authorities since that time. He was receiving anti-psychotic medication during his incarceration from February, 1976 until October, 1978 and was diagnosed as being paranoid

> schizophrenic at that time. After his incarceration on death row in 1980, the department of corrections resumed treatment of him with a variety of antipsychotic medications and Dilantin. That treatment has continued throughout his death row incarceration. Mr. Selvage is currently psychotic and despite receiving medication and psychological treatment, suffers from delusions, hallucinations and flight of ideas.

Appendix D, at 3.

31. Moreover, Dr. Merikangas determined that Mr. Selvage was likely psychotic at the time that the robbery-murder occurred in July, 1979. He has explained his reasoning in this regard as follows:

> In light of his history, it is my opinion that Mr. Selvage was suffering from a psychosis as well as other disorders at the time of the crime. It should be noted that the crime occurred when Mr. Selvage was not institutionalized and not, therefore, likely receiving consistent drug therapy or treatment. Given that Mr. Selvage's psychotic processes are not in full remission even when he is receiving consistent treatment, it is highly likely that he was acutely psychotic during the time when the crime took place.

Appendix D, at 3-4.

32. Dr. Merikangas' reasoning is strongly supported by the Texas Department of Corrections' assessment and treatment of Mr. Selvage since he has been on death row. TDC mental health personnel have consistently diagnosed Mr. Selvage as suffering from psychosis, because he has suffered from three of the major symptoms of paranoid schizophrenia since he has been on death row:

(a) He has experienced "bizarre delusions (content is patently absurd and has no possible basis in fact), such as delusions of being controlled," *DSM-III*, at 188. He feels that he has another being in him which periodically "possesses him." During these times he engages in bizarre behavior, such as growling, staring in a mirror and grunting, rocking back and forth in a fetal-like position, and head-banging. *See, e.g.*, Appendix E, at 1, 3, 7, 9-10, 11, 12-13. TDC personnel have characterized these incidents as "episodic lapses into bizarre and apparently psychotic delusions." *Id.* at 10.

(b) Mr. Selvage has also suffered "somatic . . . delusions without persecutory or jealous content," *DSM-III*, at 188. Typically, he "reports strange and bizarre somatic symptoms, feels [his] body swell after exercise, and [believes] that hot fluids cause an infection that makes him so fearful he feels like killing himself." Appendix E, at 5. TDC personnel have observed on several occasions that these "somatic delusions persist." *See, e.g.*, Appendix E, at 6, 8.

(c) Further, Mr. Selvage has suffered "delusions with persecutory . . . content . . . accompanied by hallucinations," *DSM-III*, at 189. One of the most striking examples of Mr. Selvage's suffering this kind of delusion was recorded when he refused to leave his cell during the course of a routine cell-search:

> Pt. refusing to come out of cell stating his rec[reation] group [was] going to get [an officer] to kill him. He agreed to leave his cell for search if I stayed with him, which I did. Pt. continued to discuss his paranoia with me, alternately stating "guy in next cell; dude in 14 cell" etc. "is going to kill me." When I showed him the cells

> were empty, he then began discussing the possibility that "it's all in my head." I continued to deal with his fears, reassuring him that even though he was hallucinating, these seemed just as real to him.

Appendix E, at 4.

33. On the basis of his reasoning that Mr. Selvage was psychotic at the time of the robbery-murder herein, Dr. Merikangas has explained that the psychosis likely would have made Mr. Selvage insane, or at least would have substantially impaired his capacity to appreciate the wrongfulness of his criminal conduct or to refrain from engaging in such conduct, at that time:

> In my opinion, John Selvage was not fully responsible for his behavior at that time. His psychosis, the residual effects of his severe and long history of drug abuse, including opiates and amphetamines, in combination, resulted in a diminished capacity to appreciate the wrongfulness of his conduct and rendered him less than fully capable of conforming his conduct to the requirements of law. According to John, he was high on heroin and amphetamines at the time of the crime. Amphetamines alone can induce a paranoid state and generate increased motor activity, resulting in paranoid ideation and violent acts which may be completely spontaneous or in response to command hallucinations. The kind of brain injury that John has probably suffered would have compounded both the drug-induced paranoia and his preexisting psychosis, for such an injury lowers one's ability to modulate and resist strong impulses. The severity of John's psychosis would likely have caused him to misperceive simple gestures as threats and to act on them

> without any basis in reality. While these combined factors could have produced a violent, uncontrolled outpouring of aggressive behavior, John's use of heroin could have mollified his aggression – if the dosage were high enough – and taken away his will to act. In this state, without the ability to perceive the external world accurately and make appropriate judgments in response to it because of his psychosis, John could have been peculiarly susceptible to the coercion, influence, and designs of others. In either event, I am of the opinion, to a reasonable medical certainty, that John could not distinguish the boundaries between right and wrong and could not in any way reign in his behavior to conform to the expectations of the external world.

Appendix D, at 4.

34. There can be no question that evidence such as this would have established a prima facie basis for finding a very substantial mitigating circumstance. As Justice O'Connor has explained:

> [E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.

California v. Brown, ___ U.S. ___, 93 L.Ed. 2d 934, 942 (1987). *See also Skipper v. South Carolina*, ___ U.S. ___, 90 L.Ed.2d 1, 12 (1986) (Powell, J., joined by Burger, C.J., and Rehnquist, J., concurring)("[s]ociety's legitimate desire for retribution is less strong with respect to . . . defendants who have reduced capacity for considered

choice[;] . . . [e]vidence concerning the defendant's . . . emotional history thus bear[s] directly on the fundamental justice of imposing capital punishment").

35. As Mr. Selvage's lead trial counsel has explained, however, the Texas capital punishment sentencing procedure forced counsel, through his reasonable understanding of how the procedure functioned (as opposed to how an appellate court might declare it *should* function), to refrain from presenting such evidence. *See* Appendix F. It did so for the following reasons:

(a) No matter how powerfully this evidence supported a life sentence, it bore an equally substantial risk of establishing, or helping to establish, the two "special issues" to which the jury's consideration was directed and limited. The jury, under Texas law, would receive instruction on the two special issues, but would *not* be instructed as to mitigating circumstances or on the jury's power to impose a life sentence even if the answers to both questions were "yes." Counsel could reasonably believe that by force of state law, therefore, what should be considered mitigating could be transformed into evidence *requiring* a death sentence.

(b) On the basis of the guilt-innocence portion of Mr. Selvage's trial, the evidence left a genuine question as to whether Mr. Selvage was the triggerperson in the homicide. Under Texas' law of parties, which was charged deficiently in the guilt-innocence phase, *see Selvage v. State*, 680 S.W. 2d 17, 20-21 (Tex. Cr. App. 1984), the jury could have convicted Mr. Selvage without finding that he had the intent to kill or that he was the actual

killer. *Id.* Although the courts have found that the evidence was sufficient to support such a finding, it was far from overwhelming, and the jury could have convicted without making such a finding. For this reason, there was some question in the penalty phase as to whether Mr. Selvage "committed [the homicide] deliberately and with the reasonable expectation that the death of the deceased or another would result." (Issue No. 1). Again, the courts have found that the evidence was sufficient to support a "yes" answer to issue one but was not overwhelming. As the Court of Criminal Appeals noted, "[A]lthough there is no direct evidence that appellant shot the deceased, the evidence was sufficient to show that his conduct was committed deliberately and with reasonable expectation that death would result." 680 S.W.2d at 22.

(c) In these circumstances, the presentation of "mental" mitigating evidence, such as could have been presented on behalf of Mr. Selvage, could have *strengthened* the evidence supporting the finding of deliberateness. By showing that Mr. Selvage suffered from paranoid schizophrenia, for example, the defense could have shown that Mr. Selvage was peculiarly susceptible to misperceiving non-threatening acts as threats, and to taking self-defensive action in response to these threats when such action was not called for. Unmedicated, as he likely was, Mr. Selvage was susceptible to this kind of behavior. *See* Appendix D, at 4. To be sure, Mr. Selvage's illness could also have been found to have *reduced* the likelihood that he engaged in a deliberate killing, Appendix D, at 4, but the evidence nonetheless presented a risk of adding to, rather than detracting from, the state's proof of deliberateness.

(d) Similarly, the evidence that could have been offered of Mr. Selvage's mental illness could also have *strengthened* the evidence supporting the finding of "a probability that the defendant . . . would commit criminal acts of violence that would constitute a continuing threat to society." (Issue No. 2). As Dr. Merikangas has explained, if Mr. Selvage does not take sufficient anti-psychotic medication on a daily basis, he presents a greater risk of violence than the non-psychotic person. Appendix D, at 4. To be sure, if he takes his medication as prescribed, he presents *no greater risk*. *Id*. Thus, the evidence of mental illness could have been found to have *reduced* the likelihood of future dangerousness. However, the jury could have been concerned about whether he would be sufficiently compliant to avoid this risk and could, accordingly, have treated this evidence as supporting a "yes" answer to issue two.

(e) Since mental health mitigating evidence could have run the risk of increasing the likelihood that the jury would answer the two special issues "yes," and Mr. Selvage's counsel reasonably believed that there was no provision under Texas law for the jury to give independent *mitigating* weight to the evidence, counsel had no choice but to refrain from presenting this evidence. If the Special issues were answered affirmatively, the death sentence was mandatory. There would be no opportunity for counsel to argue to the jury, or for the jury to find, that the mitigating weight of Mr. Selvage's mental illness was substantial enough to call for a life sentence, *even though* – in part due to his illness – the killing was deliberate and there was a probability that he would pose

a threat of violence in the future. As defense counsel put it

> The jury was given no third option under the Texas statute – to consider whether the evidence of mental illness was substantial enough as a mitigating circumstance to call for a life sentence, even in the face of the affirmative findings on the special issues. Thus, we could conceive of no way that such evidence could help Mr. Selvage.

Appendix F, at 3. Even if appellate courts hold counsel's interpretation of the law to be incorrect, it is unquestionably a reasonable interpretation of the law. If a statute which, when reasonably – though by appellate standards, incorrectly – interpreted, prevents counsel from investigating, presenting and arguing substantial evidence in mitigation, it functions as unconstitutionally as one which unequivocally precludes consideration of evidence in mitigation.

36. For these reasons, the Texas sentencing procedure precluded the presentation of substantial mitigating evidence on behalf of Mr. Selvage.

* * *

WHEREFORE, Mr. Selvage prays that this Court:

A. Issue a writ of habeas corpus to have him brought before it, to the end that he may be discharged from his unconstitutional confinement and restraint and/or be relieved of his unconstitutional sentence of death;

B. Conduct a hearing at which proof may be offered concerning the allegations of his petition, including the testimony of experts;

C. Permit him, because of his indigency, to proceed without prepayment of costs or fees;

D. Grant him, because of his indigency, sufficient funds to secure expert and lay testimony necessary to prove the facts as alleged in his petition;

E. Grant him the authority to obtain subpoenas in forma pauperis for witnesses and documents necessary to prove the facts as alleged in his petition;

F. Allow him a reasonable period of time subsequent to any hearing this Court determines to conduct, in which to brief the issues of law raised by this petition;

G. Stay his execution pending final disposition of his petition;

H. Grant such other relief as may be necessary and appropriate.

Dated: January 22, 1988.

[Jurat and Certificate of Service omitted in printing]

[Appendix omitted in printing]

NO. 305495-B

EX PARTE	§	IN THE 230TH DISTRICT COURT
JOHN HENRY SELVAGE, Applicant	§	OF
	§	HARRIS COUNTY, TEXAS

RESPONDENT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has considered the application for writ of habeas corpus and Respondent's answer, as well as the official court records and documents filed in the above-numbered cause. The Court finds that there are no controverted, previously unresolved facts material to the legality of Applicant's confinement which require an evidentiary hearing and recommends that the relief requested be denied. Further, this Court makes the following additional Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Applicant John Henry Selvage was charged by indictment under cause number 305495 for the felony offense of capital murder.

2. John Henry Selvage was convicted by a jury in cause number 305495 for the offense of capital murder; after the jury affirmatively answered the special issues, the court assessed punishment at death by lethal injection.

3. Attorneys John E. Crow and Dennis Kelly were appointed to represent John Henry Selvage in cause number 305495.

4. At the time of Applicant's trial, Texas law precluded jurors from considering parole eligibility in their punishment deliberations, whether or not the trial concerned a capital offense.

5. Defense counsel did not object to the admission of the extraneous offenses on the basis enunciated in ground two of Applicant's application for habeas corpus relief, i.e. that the admission of said offenses at the punishment phase of Applicant's trial violated Applicant's rights under the Eighth and Fourteenth Amendments of the United States Constitution and similar provisions of the Texas Constitution.

6. Defense counsel did not object to the court's punishment charge on the basis that it lacked a limiting instruction, nor did counsel request that such a limiting instruction on the extraneous offenses be included in the court's charge.

7. Prior to trial, defense counsel filed and obtained a ruling on a motion entitled "Motion to Hold Article 37.071 of the Texas Code of Criminal Procedure Unconstitutional and Void," in which counsel claimed: (1) that the capital sentencing procedure violates Applicant's right to be free from cruel and unusual punishment; and, (2) that Article 37.071 is vague and indefinite so as to violate Applicant's due process rights. (R. I-50).

8. At no time, either prior to or during trial, did defense counsel file a motion or lodge an objection concerning the complaint

made the basis of Applicant's third ground for relief, i.e. that the Texas capital murder statute is unconstitutional in that it precludes the jury's consideration of defense mitigation evidence as the basis for a sentence less than death and that it actually precluded the presentation of additional mitigating evidence on behalf of Applicant in the instant case.

9. Defense mitigation evidence was offered through two witnesses at the punishment phase of Applicant's trial. Applicant's sister testified concerning Applicant's family background and his accomplishments as a young adult, as well as Applicant's problems with hard drugs following his discharge from the military. (R. VII-2905-2924). Dr. Jose Garcia testified concerning the rehabilitation programs and counseling services available within the Texas Department of Corrections, including a psychological treatment program for drug addiction. (R. VII- 2924-2936).

10. Defense counsel's decision not to present psychiatric testimony as mitigation evidence was a matter of conscious trial strategy since counsel reasonably believed: (1) that a psychiatric exam would not produce evidence of incompetence to stand trial or an insanity defense; (2) that psychiatric testimony would have questionable impact and value since some jurors might perceive said testimony as a mitigating circumstance, while others might perceive it as aggravating; (3) that a psychiatric exam might produce potentially damaging evidence for the defense; and, (4) that the defense could introduce similar mitigating evidence concerning Applicant's drug

addiction and attendant emotional problems through other witnesses without inviting the possibility of State psychiatric rebuttal evidence and/or other problems associated with psychiatric evaluation and testimony. cf. **Buchanan v. Kentucky,** 107 S.Ct. 2906 (1987).

11. Defense counsel did not object to the jury charge or submit a special instruction concerning the jury's consideration of mitigation evidence.

12. In final argument, the prosecution did not argue that Applicant's drug addiction and attendant mental problems should be regarded as aggravating factors requiring a "yes" answer to the special issues. (R. VII-2964-2977).

13. In preparation for trial, defense counsel met with Applicant a few days after the crime and numerous times thereafter.

14. At no time, during the course of the investigation, trial preparation or trial itself, did Applicant give defense counsel any indication that he was anything other than sane at the time he committed the offense and competent to stand trial.

15. Defense counsel made reasonable inquiry of both Applicant and Applicant's family concerning any prior psychological problems or mental illness suffered by Applicant.

16. The information obtained from Applicant and Applicant's family, upon which counsel reasonably relied, corroborated counsels' observations of Applicant and reinforced their opinion that any behavioral and emotional problems suffered by

Applicant: (1) were due to his severe heroin addiction; and, (2) would not provide either an insanity defense or a finding of incompetence to stand trial.

17. Contrary to Dr. Merikangas' opinion, there is every indication based on: (1) counsels' observations of Applicant; (2) Applicant's recollection of the offense; and (3) Applicant's demeanor and lucid, appropriate responses both near in time to the offense and at the trial itself, that mental illness suffered by Applicant at or near the time of the offense and trial, if any, did not manifest itself.

CONCLUSIONS OF LAW

1. Applicant has no constitutional right to voir dire prospective jurors concerning their perceptions about a life sentence under Texas law.

2. The burden of proof in a habeas corpus proceeding is on the applicant. Applicant has wholly failed in his burden of showing: (1) that prospective jurors held misconceptions about the length of life sentences; (2) that the misconceptions, if any, created a bias against the imposition of a life sentence that rendered the jury's sentencing decision in Applicant's case arbitrary and capricious; and, (3) that educating prospective jurors on parole eligibility law would lessen the likelihood of arbitrary and capricious sentencing decisions.

3. Applicant is procedurally barred from raising ground for relief two as he failed to object to the admission of extraneous offenses in the punishment phase of his trial on the basis articulated in ground for

relief two, i.e. that the admission of said extraneous offenses during the penalty phase of his trial violated the Eighth and Fourteenth amendments of the U.S. Constitution and similar provisions of the Texas Constitution.

4. The admission of unadjudicated extraneous offenses in the punishment phase of Applicant's trial is provided for by Texas law and is constitutionally permissible.

5. Applicant's contention, that the trial court should have given the jury a limiting instruction on the extraneous offenses, was raised and rejected by the Court of Criminal Appeals on direct appeal. As such, the claim need not be reconsidered. **Ex parte Acosta,** 672 S.W.2d 470 (Tex. Crim. App. 1984).

6. A limiting instruction on unadjudicated extraneous offenses introduced at the penalty phase of a Texas capital murder trial is not constitutionally required.

7. Despite the lack of a specific limiting instruction on the extraneous offenses admitted at the punishment phase of the trial, Applicant's constitutional rights were adequately protected during the penalty phase of the trial by: (1) the instructions concerning burden of proof given the jury in voir dire and the punishment charge itself; (2) the identification hearings outside the jury's presence; and (3) the opportunity to cross-examine the eye-witness identifications in front of the jury.

8. Applicant is procedurally barred from raising ground for relief three as he failed to object to the Texas capital murder statute at the time of trial on the basis articulated in

ground for relief three, i.e. that the Texas capital murder statute is unconstitutional in that it precluded the presentation of mitigating evidence on behalf of Applicant.

9. Applicant's Motion to Hold Article 37.071 of the Texas Code of Criminal Procedure Unconstitutional and Void and the trial court's ruling thereon did not raise *or* preserve for appeal the issues raised in ground for relief three as the motion sets forth a constitutional claim different than that raised in Applicant's third ground for relief.

10. The Texas capital murder scheme adequately narrows the class of death-eligible defendants and sufficiently provides for the jury's consideration of mitigating circumstances. **Jurek v. Texas,** 428 U.S. 262, 274 (1976). *See* **Lowenfield v. Phelps,** No. 86-6867 (del. January 18, 1988).

11. Applicant has wholly failed in his burden of showing: (1) that he was denied an individualized sentencing hearing; and (2) that the jury did not or could not consider all of the evidence introduced at the punishment phase of the trial, including the mitigation evidence presented by the defense.

12. Nothing precluded the jury from grasping the logical relevance of the mitigation evidence introduced by Applicant and giving that evidence effect, i.e. the jury was free to conclude that Applicant's criminal conduct was drug-related, that rehabilitation programs in the Texas Department of Corrections could correct Applicant's drug problem, and that Applicant, once rehabilitated, would no longer constitute a threat to society. *See* **Williams v. Lynaugh,** ___ F.2d ___, No. 88-2131 (5th Cir. Feb. 10,

1988). *Compare* **Penry v. Lynaugh,** 832 F.2d 915 (5th Cir. 1987).

13. Defense counsel were not ineffective in foregoing both psychiatric examination of Applicant and presentation of psychiatric testimony at the punishment phase of Applicant's trial. Counsels' decisions were reasonable, based upon information supplied them by Applicant and Applicant's family. *See* **Wilkerson v. State,** 726 S.W. 2d 542 (Tex. Crim. App. 1986); **Ex Parte Vestal,** 468 S.W.2d (Tex. Crim. App. 1971); **Stone v. State,** 638 S.W.2d 629 (Tex. App. – Houston [1st Dist.] 1982, pet. ref'd.). Additionally, said decisions were a matter of conscious trial strategy.

14. Defense counsel rendered reasonably effective assistance of counsel in the investigation, preparation and trial of Applicant's case.

15. Applicant has failed to demonstrate that his conviction was improperly obtained. Accordingly, it is recommended to the Texas Court of Criminal Appeals that relief be denied.

ORDER

THE CLERK IS ORDERED to prepare a transcript of all papers in cause number 305,495-B and transmit same to the Court of Criminal Appeals as provided by Article 11.07 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

1. all of the Applicant's pleadings in cause number 305495-B;

2. all of Respondent's pleadings in cause number 305495-B;

3. the Court's order;

4. the indictment, judgment and sentence in cause number 305495;

5. the affidavit of Mr. John E. Crow;

6. all motions for psychiatric evaluation and all psychiatric reports filed in cause number 305495-B;

7. the entire appellate record in cause number 305495, the Statement of Facts and the transcript and the appellate opinion in cause number 305495;

8. the Applicant's and Respondent's proposed findings of fact and conclusions of law.

THE CLERK is further ORDERED to send a copy of this order to the Applicant.

Signed on this ___ day of MAR 14 1988, 1988.

/s/ Joe Kegaus
JUDGE PRESIDING
[Joe Kegaus]

[Texas Court of Criminal Appeals]

EX PARTE JOHN HENRY SELVAGE — Habeas Corpus Application
WRIT NO. 16,884-02 — from HARRIS County

ORDER

This is a post conviction application for writ of habeas corpus filed pursuant to the provisions of Article 11.07, V.A.C.C.P.

The record reflects that on February 8, 1980, applicant was convicted of the offense of capital murder. The jury answered in the affirmative the special issues submitted pursuant to Article 37.071, V.A.C.C.P. Punishment was assessed at death. Applicant's conviction was affirmed on direct appeal to this Court. Selvage v. State, 680 S.W.2d 17 (Tex.Cr.App. 1984).

In the instant cause, applicant presents five allegations in which he challenges the validity of his conviction. The trial court has entered findings of fact and conclusions of law and recommended the relief sought be denied.

This Court has reviewed the record. The findings and conclusions entered by the trial court are fully supported by the record and the relief sought is denied.

IT IS SO ORDERED THIS THE 18TH DAY OF MARCH, 1988.

PER CURIAM

En Banc

Do Not Publish

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF TEXAS HOUSTON DIVISION

JOHN HENRY SELVAGE, Petitioner	§	
vs.	§	
JAMES A. LYNAUGH, DIRECTOR TEXAS DEPARTMENT OF CORRECTIONS,	§	CIVIL ACTION NO. H-88-0166
Respondent	§	

RESPONDENT'S ANSWER, MOTION TO DISMISS FOR ABUSE OF THE WRIT, MOTION FOR SUMMARY JUDGMENT AND SUPPORTING BRIEF, AND OPPOSITION TO APPLICATION FOR STAY OF EXECUTION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES James A. Lynaugh, Director, Texas Department of Corrections, hereinafter "the state," by and through the Attorney General of Texas, and files this Answer, Motion to Dismiss for Abuse of the Writ, Motion for Summary Judgment and Supporting Brief, and Opposition to Application for Stay of Execution. In support thereof, the state would respectfully show the court the following:

I.

JURISDICTION

This court has jurisdiction over the subject matter and parties pursuant to 28 U.S.C. §§ 2241, 2254.

II.

DENIAL

The state denies each and every allegation of fact made by Petitioner, hereinafter "Selvage", except those supported by the record and those specifically admitted herein.

III.

STATEMENT OF THE CASE

A. *Course of Proceedings and Disposition Below*

The state has lawful custody of Selvage pursuant to a judgment and sentence of the 230th Judicial District Court of Harris County, Texas, in Cause No. 305495, styled *The State of Texas v. John Henry Selvage*. On December 4, 1979, Selvage was indicted in a two paragraph indictment for the offense of capital murder of Albert Garza, while in the course of committing and attempting to commit the offense of robbery of Stephen Ventura, and for the offense of capital murder of Albert Garza, a peace officer known by Selvage to be acting in the lawful discharge of an official duty, to which Selvage entered a plea of not guilty.

Trial began on February 4, 1980, and on February 8, 1980, the jury found Selvage guilty of the capital offense. On February 11, 1980, after a punishment hearing, the jury answered affirmatively the two special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1987). Accordingly, punishment was assessed at death. Selvage appealed to the Court of Criminal Appeal of Texas, which affirmed on July 11, 1984, *Selvage v. State*, 680 S.W.2d 17 (Tex. Crim. App. 1984), and denied rehearing on October 10, 1984. Selvage did not seek certiorari review.

The trial court subsequently scheduled Selvage's execution for November 14, 1985. Without seeking state habeas corpus relief, Selvage sought a stay of execution in this Court, which was granted on November 8, 1985. On January 26, 1986, Selvage filed his amended petition for writ of habeas corpus, which was denied by the Court on October 6, 1986. Notice of appeal was not timely filed. However, on March 4, 1986, this Court vacated its earlier judgment pursuant to Fed.R.Civ.P. 60(b), but readopted its previous memorandum and order denying habeas corpus relief. *Selvage v. Lynaugh*, No. H-85-6253 (S.D. Tex. Mar. 4, 1986). Selvage appealed this Court's judgment, and the United States Court of Appeals affirmed on July 23, 1987. *Selvage v. Lynaugh*, 823 F.2d 845 (5th Cir. 1987). A petition for writ of certiorari was subsequently denied by the United States Supreme Court on November 2, 1987. *Selvage v. Lynaugh*, ___ U.S. ___, 108 S.Ct. 309 (1987).

While his Rule 60(b) motion was pending in this Court, Selvage filed his first state habeas corpus application in the state convicting court on March 3, 1987. The application was subsequently denied by the Texas Court

of Criminal Appeals. *Ex parte Selvage*, No 16,884-01 (Tex.Crim.App. Mar. 6, 1987).

On December 10, 1987, the trial court rescheduled Selvage's execution for January 27, 1988. On January 21, 1988, Selvage filed his second state habeas corpus application in the trial court. On January 25, 1988, the trial court modified Selvage's death warrant and rescheduled his execution for March 30, 1988. On March 14, 1988, the trial court entered findings of fact and conclusions of law, recommended denial of the writ and forwarded the application to the Court of Criminal Appeals, which adopted the trial court's findings in denying the writ. *Ex parte Selvage*, No 16,884-02 (Tex.Crim.App. Mar. 21, 1988).

B. *Statement of Facts*

The facts surrounding Selvage's commission of capital murder are accurately set forth in the opinion of the Court of Criminal Appeals, *Selvage v. State*, 680 S.W.2d at 18-19, and the opinion by the United States Court of Appeals for the Fifth Circuit. *Selvage v. Lynaugh*, 823 F.2d at 846-47.

IV.

EXHAUSTION

As he has posed his claims in the application, Selvage has exhausted his available state court remedies.

V.

PETITIONER'S ALLEGATIONS

Selvage makes the following allegations in support of his application for writ of habeas corpus:

> 1. The trial court's refusal to allow Selvage to question prospective jurors on their understanding of the amount of time a person would spend in the penitentiary upon receiving a life sentence violated his rights under the Eighth and Fourteenth Amendments;
>
> 2. The introduction of evidence of unadjudicated criminal conduct at the punishment phase of trial violated Selvage's rights under the Eighth and Fourteenth Amendments;
>
> 3. The Texas capital sentencing procedures, without instruction to the jury, do not allow for the consideration of mitigating evidence proffered by the defendant as a basis for a sentence less than death, in violation of the Eighth and Fourteenth Amendments;
>
> 4. In failing to provide a means whereby the jury could give independent mitigating weight to mitigating evidence, the Texas capital sentencing statute precluded the presentation by Selvage of additional mitigating evidence, in violation of the Sixth, Eighth and Fourteenth Amendments; and
>
> 5. Trial counsel rendered ineffective assistance in violation of the Sixth and Fourteenth Amendments by failing to investigate and present evidence of Selvage's mental illness in mitigation of punishment.

VII.

STATE COURT RECORDS

Certified copies of the records of Selvage's trial, appeal and two state writ applications have been provided to the Court

VIII.

MOTION TO DISMISS FOR ABUSE OF THE WRIT

SELVAGE'S SECOND AND SUCCESSIVE HABEAS PETITION CONSTITUTES AN INTOLERABLE ABUSE OF THE WRIT.

Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Court states in pertinent part:

> A second or successive petition may be dismissed if . . . new or different grounds are alleged, [if] the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

This provision applies with equal force to capital murder petitioners under sentence of death. E.g. *Johnson v. Lynaugh*, 821 F.2d 224 (5th Cir.), *stay denied*, ___ U.S. ___, 107 S.Ct. 3248 (1987); *Berry v. Phelps*, 819 F.2d 511 (5th Cir.), *stay denied*, ___ U.S. ___, 107 S.Ct. 3179 (1987). In fact, the Supreme Court has explicitly stressed its applicability.

> A pattern seems to be developing in capital cases of multiple review in which claims that could have been brought years ago are brought forward – often in a piecemeal fashion – only after the execution date is set or becomes imminent. Federal courts should not continue to tolerate – even in capital cases – this type of abuse of the writ of habeas corpus.

Woodard v. Hutchins, 464 U.S. 377, 380, 104 S.Ct. 752, 753-54 (1984) (Powell, J., joined by Burger, C.J., Blackmun, Rehnquist and O'Connor, JJ., concurring).

It has consistently been held in this circuit that the appropriate standard against which to determine abuse of the writ is not whether a petitioner intended to bypass an issue at the time of the earlier petition, but "whether he withheld it without legal excuse when he filed his earlier petition." *Hamilton v. McCotter*, 772 F.2d 171, 176 (5th Cir. 1985), *quoting Jones v. Estelle*, 722 F.2d 159, 163 (5th Cir. 1983) (en banc), *cert denied sub nom. Jones v. McKaskle*, 466 U.S. 976, 104 S.Ct. 2356 (1984). Legal excuse may exist if, after the previous proceedings, there is a change in the law that makes the claim possible or the petitioner becomes aware or chargeable with knowledge of the asserted facts on which the new claim is based. *Hamilton v. McCotter*, 772 F.2d at 176. Where a petitioner has been represented by competent counsel in a prior habeas proceeding, he is held to possess knowledge of potential grounds for relief that is chargeable to counsel. *Moore v. Butler*, 819 F.2d 517, 519 (5th Cir. 1987).

Selvage has been represented by counsel since well before his February, 1980 trial. There is **no legitimate reason** why, if Selvage believed that the Texas capital sentencing statute was constitutionally infirm because it did not mandate instruction on consideration of mitigating evidence or did not allow the jury to consider evidence of his mental condition, that the admission of unadjudicated criminal conduct was constitutionally impermissible, or that the Constitution mandated questioning of jurors on parole considerations, he did not raise such claims in his earlier federal petition.

In highly conclusory fashion, Selvage claims that his abuse of the writ should be excused because prior habeas counsel raised in his first habeas petition only issues that he raised on direct appeal "without undertaking any investigation of the case" and, after relief was denied, counsel did not appeal this Court's judgment.[1] It is now settled that ineffective assistance of habeas counsel may constitute legal cause for an abuse of the writ, *see Jones v. Estelle*, 722 F.2d at 167. Selvage's prior habeas counsel, Mr. Don Rogers, demonstrated a thorough, vigorous, diligent and intelligent attack on the constitutional validity of his conviction and sentence.[2] Selvage wholly fails to

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[1] Selvage did assert as support for his Rule 60(b) motion in his earlier federal habeas action that prior habeas counsel was ineffective, but solely on the ground that counsel failed to timely file notice of appeal, thus depriving Selvage of the opportunity to appeal this Court's denial of the writ. Of course, the granting of the Rule 60(b) motion rendered that claim of ineffective assistance moot.

[2] In its March 4, 1987, order granting Selvage's Rule 60(b) motion, but denying leave to amend the petition, this Court acknowledged prior counsel's competence in formulating Selvage's attack on his conviction:

> Selvage's original counsel in this habeas action filed a detailed petition for writ of habeas corpus and later filed a first amended petition. The first amended petition raises four basic constitutional attacks on his conviction. It cites at length from the transcript of Selvage's murder trial and from the applicable State and constitutional law. This Court will not grant Selvage leave to amend his petition simply because new counsel may want to raise additional grounds for habeas relief.

Selvage v. Lynaugh, No. H-85-6253, March 4, 1987, order, at 4-5.

demonstrate that counsel acted unreasonably in not presenting his current claims in his prior petition. Texas law clearly does not allow the jury to consider, and consequently a defendant to inquire about in *voir dire*, parole considerations. Likewise, Texas' restriction on *voir dire* has been long upheld as a constitutional matter in this circuit. *See O'Bryan v. Estelle*, 714 F.2d 365 (5th Cir. 1983), *cert. denied*, 465 U.S. 1013, 104 S.Ct. 1015 (1984); *Moreno v. Estelle* 717 F.2d 171 (5th Cir. 1983), *cert. denied*, 466 U.S. 198, 104 S.Ct. 2353 (1984).[3] The introduction of unadjudicated offenses during the punishment phase of trial has long been upheld as a matter of state law, and has been upheld as a matter of constitutional law. *Milton v. Procunier*, 744 F.2d 1091 (5th Cir. 1984), *cert. denied*, 471 U.S. 1030, 105 S.Ct. 2050 (1985); *Autry v. Estelle*, 706 F.2d 1394, 1406 n.5 (5th Cir. 1983). The constitutionality of the Texas capital sentencing statute has been long-established, *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950 (1976), and the failure to instruct the jury on its consideration of mitigating evidence has been long held in this circuit to be constitutionally permissible. *Esquivel v. McCotter*, 777 F.2d 956 (5th Cir. 1985); *Gray v. Lucas*, 677 F.2d 1086 (5th Cir. 1982). Thus, assuming the applicability of the standard set forth

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[3] Selvage's assertion that the panel opinion in *King v. Lynaugh*, 828 F.2d 257 (5th Cir.), *reh. en banc granted*, 828 F.2d 269 (5th Cir 1987), constitutes a change in the law, thereby excusing his failure to earlier assert this claim, is misplaced. Under the rules of the Fifth Circuit, the granting of rehearing en banc operates to vacate the panel opinion. *See* Appendix A, attached hereto. Therefore, because the panel opinion has no precedential value, it cannot constitute a change in the law.

in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), in gauging the effectiveness of habeas counsel, *see Johnson v. Cabana*, 818 F.2d 333, 340-41 (5th Cir. 1987); *Daniels v. Blackburn*, 763 F.2d 705, 710 (5th Cir. 1983), Selvage does not demonstrate deficient performance on habeas counsel's part. Because there is no constitutional requirement that competent counsel file every non-frivolous claim on direct appeal, *Barnes v. Jones*, 463 U.S. 745, 103 S.Ct. 3308 (1983), *a fortiorari*, no such right can exist to excuse piecemeal litigation in collateral review, a proceeding even further removed from direct appeal and which has no constitutional footing. *Cf. Pennsylvania v. Finley*, ___ U.S. ___, 107 S.Ct. 1990 (1987).

Moreover, Selvage cannot demonstrate prejudice resulting from habeas counsel's performance. As set forth in section IX A, *infra*, questioning of prospective jurors on parole considerations is not constitutionally required. As set forth in section IX B, *infra*, review of Selvage's Eighth and Fourteenth Amendment claim that unadjudicated criminal conduct is inadmissible in the punishment phase of a capital murder trial is procedurally barred, and, in any event, under the law of this circuit Selvage cannot prevail on such a claim. As set forth in section IX C, *infra*, Selvage's two interrelated claims that the Texas capital sentencing procedures are constitutionally defective because they do not allow for the presentation and consideration of mitigating evidence are barred under the procedural default doctrine, and further are contrary to the established law of the circuit. Finally, as set forth in section IX D, *infra*, counsel's decision to present lay testimony regarding Selvage's drug history and the availability of rehabilitation programs, rather than obtain a

psychiatric examination and produce psychiatric testimony, was a sound trial strategy, and Selvage's claim of ineffective assistance of counsel is frivolous. Hence, because Selvage does not and cannot demonstrate any deficiency on the part of prior counsel or any prejudice resulting from counsel's failure to raise his current claims in his prior petition, any allegation of ineffective assistance of counsel to excuse abuse of the writ fails *as a matter of law. Milton v. McCotter*, 765 F.2d at 437.

IX.

MOTION FOR SUMMARY JUDGMENT AND SUPPORTING BRIEF

* * *

C.

THE TEXAS CAPITAL SENTENCING STATUTE AS APPLIED MEETS THE CONSTITUTIONAL REQUIREMENT OF INDIVIDUALIZED SENTENCING WITHOUT THE NECESSITY OF A SPECIAL INSTRUCTION ON MITIGATING EVIDENCE.

Selvage next argues that the Texas capital sentencing statute precludes jury consideration of relevant mitigating evidence that might serve as a basis for a sentence less than death. He contends that because the jury is limited to answering the special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071(b), and because the state does not require an instruction on how to consider mitigating evidence, the jury could fail to see the relevance of some evidence that might persuade it to not impose the death penalty. Thus, the evidence would

not be taken into consideration during punishment deliberations, in violation of the holdings of *Lockett v. Ohio*, 438 U.S. 536, 98 S.Ct. 2954 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869 (1982), and their progeny. He relies on the granting of the petition for writ of certiorari in *Franklin v. Lynaugh*, ___ U.S. ___, 108 S.Ct. 221 (1987),[6] and the recent Fifth Circuit case of *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir. 1987), in which the same issue is raised, to support his contention.

1. Consideration of Selvage's claim is barred by his failure to object on this basis at the time of trial.

Prior to trial, Selvage filed a motion to have the Texas capital sentencing statute declared unconstitutional on the basis that it 1) violated his right to be free from cruel and unusual punishment, and 2) was vague and indefinite so as to violate his rights to due process. Selvage did not object to the court's charge at the punishment phase of trial, did not submit a proposed instruction on mitigating evidence, or otherwise object to the capital sentencing statute on the grounds now urged. When he presented these claims in his application for state writ of habeas corpus, the state courts noted that his current claims did not comport to his objection to the validity of the statute voiced at trial and, consequently, the courts imposed their

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[6] The precise question upon which the Supreme Court granted certiorari is "[w]hether the jury must be instructed on the effect of mitigating evidence under the Texas capital punishment scheme." *See* relevant portion of petition in *Franklin*, attached hereto as Appendix B.

contemporaneous objection rule and held that review of the merits of the claims were barred. *Ex parte Selvage*, No. 16,884-02 (March 21, 1988).

When a defendant fails to follow a state procedural rule and review of a claim of error is refused by state courts, federal habeas review of the claim is barred, unless he can demonstrate cause and prejudice for his failure. *Murray v. Carrier*, 477 U.S. ___, ___, 106 S.Ct. 2639, 2648 (1986); *Engle v. Isaac*, 456 U.S. 107, 129, 102 S.Ct. 1558, 1572 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S.Ct. 2497, 2506 (1977); *Streetman v. Lynaugh*, 835 F.2d 1519, 1520-21 (5th Cir.), *stay denied*, ___ U.S. ___, 108 S.Ct. 588 (1988); *Thompson v. Lynaugh*, 821 F.2d at 1062. Selvage has demonstrated no cause for his failure to timely object on the grounds now raised, nor has he alleged any prejudice. Accordingly, his claims should be dismissed without reaching the merits.

2. The granting of certiorari in *Franklin* does not entitle Selvage to a stay of execution.

Moreover, the mere granting of the petition for writ of certiorari does not change the law of this circuit so that Selvage would be entitled to a stay of execution. *Streetman v. Lynaugh*, 835 F.2d 1519, 1520 (5th Cir.), *stay denied*, ___ U.S. ___, 108 S.Ct. 588 (1988); *cf. Johnson v. McCotter*, 804 F.2d 300 (5th Cir. 1986); *Berry v. Phelps*, 795 F.2d 504 (5th Cir. 1986). This court is bound by earlier precedent, which has held that the Texas capital punishment statute is constitutional. *Penry v. Lynaugh*, 832 F.2d at 926; *see Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950 (1976).

In his attempt to persuade this court to grant a stay of execution, Selvage blatantly misrepresents the Supreme Court's action in *Williams v. Lynaugh*, 837 F.2d 1294 (5th Cir.), *stay granted*, ___ U.S. ___, 108 S.Ct. ___ (1988). Selvage asserts that the Court's action in that case was unanimous (Petitioner's Supplemental Memorandum at 2). As this court is well aware, formal dissent in such cases is extremely rare and the mere fact that no formal dissent is noted does not mean that all of the justices agreed to the action. This case is in no different posture than was *Streetman v. Lynaugh, supra*, in which the Supreme Court denied the requested stay of execution.

3. Selvage is not entitled to relief on the ground that the Texas capital sentencing statute is unconstitutional.

Even if the court were to address the merits of Selvage's claim, he is not entitled to relief. To pass constitutional scrutiny, a state's capital sentencing procedure must allow for individualized sentencing. *California v. Brown*, ___ U.S. ___, ___, 107 S.Ct. 837, 839 (1987). This is accomplished by requiring that the defendant be permitted to introduce and the sentencing authority to consider, as a mitigating factor, any evidence relevant to "any aspect of the defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.*; *Lockett v. Ohio*, 438 U.S. at 604, 98 S.Ct. at 2964. Evidence is relevant to the sentencing considerations if it has some bearing on the defendant's personal responsibility and moral guilt for his crime, or on whether he will constitute a future threat. *Tison v. Arizona*, ___ U.S. ___, ___, 107 S.Ct. 1676,

1683 (1987); *California v. Brown*, ___ U.S. at ___, 107 S.Ct. at 839; *Enmund v. Florida*, 458 U.S. 782, 801, 102 S.Ct. 3368, 3375 (1982); *Lockett v. Ohio*, 438 U.S. at 605, 98 S.Ct. at 2965.

The Texas statute clearly permits a defendant to introduce any relevant mitigating evidence that he wants the jury to consider in making its punishment decision. The statute does not contain a list of defined mitigating factors, as did the Ohio statute in *Lockett*, or the Florida statute in *Hitchcock v. Dugger*, ___ U.S, ___, 107 S.Ct. 1821 (1987), both of which were held to preclude introduction and consideration of certain mitigating evidence. Instead, any evidence relating to the defendant's character or to any of the circumstances of the offense can be put before the jury.

Furthermore, the special issues allow for jury consideration of the proffered evidence. The first special issue asks the jury to determine whether the defendant acted deliberately and with the reasonable expectation that the death of the victim or another would result. Evidence about the circumstances surrounding the murder is relevant to determining a defendant's ability to deliberately act, as is evidence about possible personality disorders or, in Selvage's case, drug addiction. The jury can readily grasp the significance of such evidence to the first special issue, and Selvage was not impeded in his ability to present or argue the relevance of such evidence to the jury.

Likewise, the second special issue concerns whether there is a probability that the defendant will commit future acts of violence that would constitute a continuing

threat to society. Evidence of the defendant's past behavior, his upbringing, his mental and emotional development, and his prospects for rehabilitation is relevant to the jury's consideration of this issue. Again, this is the very kind of evidence that Selvage offered in mitigation at his trial through the testimony of his sister and that of Dr. Jose Garcia. The fact that the jury was not persuaded indicates only that it did not ascribe sufficient weight to the evidence to raise a reasonable doubt as to the answers to the special issues, not that the evidence was excluded from consideration.

Further, Selvage's claim that potentially mitigating evidence of his alleged psychosis was withheld because it could have been used as evidence to *support* imposing a death sentence is unavailing. The Constitution does not require that evidence introduced in a capital-sentencing hearing be exclusively mitigating or aggravating. That both the state and the defendant might be able to use the same evidence to support opposing contentions does not offend the Constitution, as long as the jury is not precluded from considering the mitigating aspects, if any, of the evidence. Evidence relating to punishment is circumstantial, and like any circumstantial evidence, it is susceptible of more than one interpretation. It is for the sentencer to determine what weight each aspect of the evidence receives. *See Eddings*, 455 U.S. at 114-15, 102 S.Ct. at 877; *Barclay v. Florida*, 463 U.S. 939, 961 n.2, 103 S.Ct. 3418, 3432 n.2 (1983) (Stevens, J., concurring) (neither *Lockett* nor *Eddings* held that any particular weight must be given by the sentencer to mitigating evidence. Selvage has failed to identify any relevant mitigating

evidence that the jury was, or would have been, precluded from considering under the Texas statute.

Moreover, Selvage's assertion that the statute precluded admission of mitigating evidence in existence at the time of trial is factually incorrect. His newly discovered "psychosis" did not manifest itself before or at the time of Selvage's trial such that counsel should have been aware of its existence. Counsel inquired of both Selvage and his family as to prior mental problems, to no avail. Counsel's observance of Selvage, both in interviews conducted before trial and at trial, belied the existence of any mental problems, and counsel's opinion that Selvage did not suffer from mental illness is fully corroborated by a reading of Selvage's lucid, intelligent responses during examination in pretrial hearings (SF III 775-837).[7]

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[7] Selvage's asserts that the trial court's and the Court of Criminal Appeals' factual determination that his mental illness, if any, did not manifest itself at the time of the offense and trial is not entitled to a presumption of correctness, referring to the finding as "lay inferences" by the state district judge based upon "lay observances" by his trial counsel. Selvage's elevation of a psychiatrist's opinion, rendered over eight years after the fact, that Selvage's psychosis was readily apparent at the time of the offense and trial over the observances of counsel and the court made at the time of the offense and trial of no outward indications of mental illness, observances that are buttressed by the trial record revealing a lucid and responsive Selvage, amounts to nothing more than a disagreement with the credibility choice made by the state courts. Presented with conflicting evidence, the trial judge was obligated to make such a choice. Moreover, a hearing by affidavit, as was conducted by the state courts, constitutes a "hearing" within the meaning of 29 U.S.C. §2254, *Smith v. Estelle*, 711 F.2d 877 (5th Cir.), *cert. denied*, 466 U.S. 906, 104 S.Ct. 1685 (1984), and because the state court's finding is supported in the record, it must be accorded a presumption of correctness.

When stripped of its embellishments, Selvage's claim is simply that a capital-sentencing statute *must* allow the jury to dispense mercy, even though it finds that the evidence warrants the death penalty. The Supreme Court has recognized that the occasional granting of mercy to a defendant does not violate the constitution. *Gregg v. Georgia*, 428 U.S. 153, 199, 96 S.Ct. 2909, 2937 (1976). The Court has also approved the Texas statute while noting that the death penalty is mandatory if the jury answers all of the special issues affirmatively. *Jurek v. Texas*, 428 U.S. at 278, 96 S.Ct. at 2959 (White, J., concurring); *see also Lowenfield v. Phelps*, ___ U.S. ___, ___, 108 S.Ct. 546, 554 (1988). And in *California v. Brown*, ___ U.S. ___, 107 S.Ct. 837 (1987), the Court expressly held that there is no constitutional violation in giving an instruction that tells the jury it is not to be swayed in making its capital-sentencing decision by sentiment or sympathy. Such factors should not "play any role in the jury's sentencing determination, even if such factors might weigh in the defendant's favor." *Id.* at ___, 107 S.Ct. at 840. Thus, Selvage's claim is without merit.

XI.

SELVAGE RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL.

As his final claim for relief, Selvage contends that his trial attorneys rendered ineffective assistance. It is now well established that claims of ineffective assistance of counsel are to be reviewed under the two-prong standard of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). *See Burger v. Kemp*, ___ U.S. ___, 107 S.Ct. 3110

(1987); *Darden v. Wainwright*, ___ U.S. ___, 106 S.Ct. 2465 (1986). To meet this standard, a criminal defendant must demonstrate:

> First . . . that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversarial process that renders the result unreliable.

Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. In reviewing such claims, "judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689, 104 S.Ct. at 2065, and every effort must be made to eliminate "the distorting effect of hindsight." *Id.*, 104 S.Ct. at 2066. Courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and a defendant must overcome the presumption that the "challenged action 'might be considered sound trial strategy.'" *Id.*

To demonstrate prejudice the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. at 2068. When a defendant challenges the death sentence, the question is "whether there is a reasonable probability that, absent the errors, the sentencer -- including the

appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695, 104 S.Ct. at 2069.

It is not sufficient that the habeas petitioner merely allege a deficiency on the part of counsel; he must affirmatively plead prejudice in his petition. *Hill v. Lockhart*, ___ U.S. ___, ___, 106 S.Ct. 366, 371 (1986); *Manning v. Blackburn*, 786 F.2d 710, 712 (5th Cir. 1986). Absent such pleading, a habeas petitioner is not entitled to a federal evidentiary hearing on his claim. *Id.* The claim may be disposed of for either reasonable performance of counsel or lack of prejudice, and if one is found dispositive it is not necessary that the court address the other. *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069-70.

Selvage's allegation is not that counsel acted unreasonably in representing him. On the contrary, he contends that the culprit is the Texas capital sentencing statute. He asserts that, even if the statute does not preclude the jury from considering some types of mitigating eveidence, (sic) counsel reasonably perceived that it did so. Consequently, counsel forewent investigation and presentation of evidence of Selvage's mental condition, resulting in a death sentence that was imposed in violation of the Eighth Amendment's demand for reliability. Because the ineffectiveness in this case resulted from the state's interference with counsel's ability to provide adequate representation, Selvage contends that there is no need for him to demonstrate prejudice.

Selvage relies on the affidavit of one of his trial attorneys, Honorable John Emmett Crow, which he submitted along with his second application for state writ of habeas corpus. In the affidavit, Crow stated that he and his co-counsel decided not to investigate Selvage's mental background because they perceived that, after the state's presentation of rebuttal psychiatric evidence, the jury would be forced to consider such evidence as aggravating with respect to the second special issue, and that the evidence would not be sufficient to raise a reasonable doubt as to the issue on deliberateness. Crow further stated that if the Texas statute had allowed the jury to impose a life sentence even though it found beyond a reasonable doubt that the special issues should be answered affirmatively, counsel would have undertaken an investigation of Selvage's mental history.

Selvage's claim that counsel was ineffective in this regard rests on the premise that the Texas statute must allow the jury to arbitrarily dispense mercy. As demonstrated in Section IX C, *supra*, the Constitution does not require that the jury be given that option. *California v. Brown*, ___ U.S. at ___, 107 S.Ct. at 839; *see also Jurek v. Texas*, 428 U.S. at 278, 96 S.Ct. at 2959 (White, J., concurring) (noting that death penalty *must* be imposed if the jury answers the special issues affirmatively). By necessity, counsel's decision to forego developing certain evidence intended solely to elicit mercy is not rendered unreasonable merely because there is no constitutional or statutory right to the assessment of a life sentence based on mercy. Such a decision is clearly not unreasonable when, as counsel correctly predicted, the state is free to

respond with psychiatric evidence of its own in aggravation. *See Buchanan v. Kentucky*, ___ U.S. ___, 107 S.Ct. 2906 (1987).

Examined in this light, counsel's strategic decision not to inquire in depth into Selvage's mental health history was clearly reasonable. From observation of Selvage and conversations with Selvage and his family, counsel had no reason to suspect that there was evidence of mental illness or disease that could have been used to support a sentence less than death. Moreover, the state court concluded that there was no evidence that Selvage manifested any symptoms of psychosis at the time of trial. The state court's findings in this regard are entitled to a presumption of correctness in these proceedings. *See* footnote 7, *supra*. Counsel's decision to forego further investigation into Selvage's mental condition was reasonable under these curcumstances. (sic) *Burger v. Kemp*, ___ U.S. ___, 107 S.Ct. 3114 (1987). On the other hand, counsel was aware of Selvage's drug problem, and developed a strategy for the punishment phase of the trial of presenting evidence, through the testimony of Selvage's sister, of his drug abuse and its effects on his personality. Further, counsel relied on the testimony of Dr. Jose Garcia about the facilities for drug treatment and rehabilitation at the Texas Department of corrections to demonstrate that Selvage's drug problem could be treated and he would no longer be a threat to society. By presenting mitigating evidence in this fashion, rather than through the testimony of psychologists or psychiatrists, counsel brought to the jury's attention evidence that would allow negative answers to the special issues without inviting rebuttal by

state psychiatrists.[8] Under the totality of the circumstances, counsel's strategy was reasonable and selvage's present claim amounts to nothing more than 20-20 hindsight. His claim of ineffective assistance is meritless.

WHEREFORE, PREMISES CONSIDERED, the state prays that the application for writ of habeas corpus be dismissed, or, in the alternative denied.

[Jurat and Certificate of Service omitted in printing]

[Appendices omitted in printing]

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[8] Selvage was arrwsted (sic) in New Orleans in August, 1979, and was indicted on December 4, 1979, over two months after the Fifth Circuit's opinion in *Smith v. Estelle*, 602 F.2d 694 (5th Cir. 1979). It is reasonable to assume that had a psychiatric examination of Selvage been ordered, appropriate warnings in compliance with *Smith* would have been given.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN HENRY SELVAGE, Petitioner	§	
VS.	§	CIVIL ACTION
JAMES LYNAUGH, Director, Texas Department of Corrections,	§	NO. H-88-166
Defendant.	§	

ORDER

Petitioner contends that because the trial court did not permit defense counsel to inquire about their understanding of what a life sentence means under Texas law, a stay of execution must be granted pending *en banc* reconsideration of *King v. Lynaugh*, 828 F.2d 257, reh'g *en banc* granted, 828 F.2d 269 (5th Cir. 1987). There is no procedural default in raising this issue. *See Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985).

The current law in this circuit is that the refusal by a Texas trial court to allow a capital defendant to conduct limited voir dire on whether jurors held misconceptions about Texas parole law mandates resentencing. *Id.* at 260. Judge Edith Jones wrote a logical vigorous dissent. *Id.* at 765-9. The Court has examined the record in Mr. Selvage's, case. It indicates that trial counsel attempted to inquire about the potential juror's understanding of what a life sentence means. Counsel's attempts were assisted in

some respects by the trial judge, *see* R. 1060-61, 1093-95, and may have been thwarted once. R. 934.

Following *King v. Lynaugh*, this Court stays Mr. Selvage's execution pending *en banc* reconsider of *King*. If the *en banc* Court decides that *King* was correctly decided, this Court may order that Mr. Selvage be resentenced. If the *en banc* Court reverses the panel decision, this Court will lift the stay of execution.

Petitioner urges this Court to stay his execution because issues presented to the United States Supreme Court in *Franklin v. Lynaugh, cert granted*, Oct. 9, 1987, No. 87-5546, are presented in this case. *Franklin* is still the law in this Circuit and this Court, bound by Fifth Circuit and Supreme Court precedent, will not stay petitioner's execution based on the granting of certiorari. *Streetman v. Lynaugh*, 835 F.2d 1534 (5th Cir. 1988), *see also Penry v. Lynaugh*, 832 F.2d 915, 924-6 (5th Cir. 1987) (upholding Texas capital sentencing statute on grounds presented here while recognizing that certiorari has been granted in *Franklin*). The Court would not grant a stay based on *Franklin* grounds.

Petitioner also claims that he received ineffective assistance of counsel because counsel failed the present evidence of Mr. Selvages apparent mental instability to mitigate a possible death sentence. Since a presentation of such evidence is precluded by Texas law, see *Penry, supra*, this court finds that Mr. Selvage was not denied effective assistance of counsel when counsel failed to make inquiry regarding mitigating evidence. The claim of ineffective assistance of counsel must be denied because counsel's performance was not deficient based on the law at the

time of trial, and Petitioner has failed to show the requisite prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984).

Finally, Petitioner contends that the admission of unreliable, unadjudicated crimes evidence during the punishment phase of the trial violated his constitutional rights. This contention was rejected in *Williams v. Lynaugh*, 814 F.2d 205 (5th Cir. 1987), *cert. denied*. In *Williams* that Court of Appeals held that putting unadjudicated, possibly unreliable, evidence before the jury during the punishment phase of a capital trial did not violate his constitutional rights. *See also Milton v. Procunier*, 744 F.2d 1091 (5th Cir. 1984). Petitioner's contention is meritless. *See also Thompson v. Lynaugh*, 821 F.2d 1054 (5th Cir. 1987).

Petitioner's motion to proceed *in forma pauperis* is GRANTED. For the reasons stated above Petitioner's application for a stay of execution is GRANTED.

Done at Houston, Texas, this 25th day of March, 1988.

/s/ Norman W. Black
NORMAN W. BLACK
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

(caption omitted in printing)

FINAL JUDGMENT

For the reasons stated in the Court's order signed this day, Petitioner's claims except those based on *King v. Lynaugh* are DISMISSED.

This is a FINAL JUDGMENT.

Done at Houston, Texas, this 25th day of March, 1988.

/s/ Norman W. Black
NORMAN W. BLACK
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

(caption omitted in printing)

ORDER STAYING EXECUTION

On application by Petitioner John Henry Selvage for a stay of execution of the sentence of death imposed upon him by the District Court of Harris County, Texas, 230th Judicial District, on March 12, 1980, and presently scheduled to be carried out on March 30, 1988 (after midnight March 29, 1988), for the reasons stated in the Court's ordered (sic) entered this day, it is

ORDERED that Petitioner's application for stay of execution is hereby GRANTED and petitioner's execution

is hereby stayed pending further order of this Court. It is further

ORDERED that Petitioner remain in custody of the Director of the Texas Department of Corrections pending further order of this Court. It is further

ORDERED that the Clerk of this Court give immediate telephonic and written notice to the Director of the Department of Corrections, to Governor Bill Clements, and to Jim Mattox, Attorney General of Texas, that the Petitioner's execution is stayed by order of this Court and that a certified copy of this order be sent by the Clerk to those persons.

Done at Houston, Texas, this 25th day of March, 1988.

/s/ Norman W. Black
NORMAN W. BLACK
UNITED STATES DISTRICT
JUDGE

John Henry SELVAGE,
Petitioner-Appellee-Appellant,

v.

James A. LYNAUGH, Director, Texas Department of Corrections,
Respondent-Appellant-Appellee.

No. 88-2278

United States Court of Appeals,
Fifth Circuit.

March 28, 1988.

[842 F.2d 89]

Before POLITZ, WILLIAMS and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

In this, John Henry Selvage's second habeas trip to the federal courts, the United States District Court has granted a stay of his execution scheduled to be carried out before sunrise on March 30, 1988. The State of Texas asks this court to vacate that stay of execution. Selvage, in turn, requests a stay pending appeal of his dismissed claims, should we vacate the stay granted by the district court. Despite the shortness of time we will describe the history of this case and then turn to each of Selvage's claims. We conclude that we must vacate the stay and deny Selvage's request for stay because we are persuaded that Selvage's only substantial claim has not been preserved for review.

I

Selvage was convicted of the capital murder of Albert Garza, a peace officer, while attempting to rob Stephen Ventura, a jeweler. The jury found Selvage guilty on February 8, 1980, and on February 11, answered affirmatively the requisite interrogatories submitted pursuant to Article 37.071, Tex.Code Crim.Proc. (Vernon Supp. 1988), the Texas capital sentencing provision. The conviction and death sentence were affirmed by the Texas Court of Criminal Appeals on July 11, 1978. *Selvage v. State*, 680 S.W.2d 17 (Tex.Crim.App.1984). Selvage did not petition for a writ of certiorari.

With his execution scheduled for November 14, 1985, Selvage sought a stay of execution from the United States District Court for the Southern District of Texas. That stay was granted on November 8, 1985. After considering Selvage's amended petition, the district court denied relief and, after what we later described as a "rankle over notice of appeal," we affirmed the denial of habeas relief. *Selvage v. Lynaugh*, 823 F.2d 845 (5th Cir.1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 309, 98 L.Ed.2d 268 (1987). When the trial court rescheduled his execution for January 27, 1988, Selvage filed his second application for state habeas relief. In this state habeas petition, Selvage asserted four bases for relief:

(1) the state trial judge denied Selvage due process by refusing inquiry during the voir dire of the panel concerning veniremens' understanding of a life sentence under Texas law;

(2) the admission into evidence of "unreliable, unadjudicated crimes evidence during the penalty phase" was contrary to the eighth and fourteenth amendments;

(3) failure of the capital sentencing procedure in Texas to allow consideration by the jury of a defendant's evidence of mitigation contrary to the eighth and fourteenth amendments; and

(4) failure of Texas capital sentencing procedure to provide a means for the jury's independent consideration of mitigating evidence.

The execution then was rescheduled for March 30, 1988, and without an evidentiary hearing, the state trial court on March 14, 1988, denied a stay with detailed

findings of fact and conclusions of law. The Texas Court of Criminal Appeals adopted the trial court's findings and denied the writ. *See Ex Parte Selvage*, No. 16, 884-02, Tex. Crim.App. (March 21, 1988).

In his application for a stay of execution and writ of habeas corpus filed in the United States District Court, Selvage made the same arguments, adding that trial counsel had failed to investigate and present evidence of Selvage's mental illness, depriving Selvage of effective representation required by the sixth and fourteenth amendments. While the last contention is arguably new, the state concedes that Selvage has exhausted his state remedies. However, the state moved to dismiss for abuse of the writ, arguing that all of Selvage's present arguments could have been made in his first habeas petition.

The district court granted both Selvage's motion to proceed in forma pauperis and his application for a stay of execution. The stay rested solely on Selvage's first claim that he was denied the right to conduct voir dire regarding veniremens' understanding of Texas parole law. The district court rejected all other grounds, denied a certificate of probable cause as to them, but did not address the state's contention that Selvage had abused the writ. Selvage has filed a cross-appeal and requests that we issue a certificate of probable cause and a stay pending that appeal.

II

[1] Our standard for review of a stay is essentially the same as the measure for granting a stay. We must consider:

(1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest. *O'Bryan v. McKaskle*, 729 F.2d 991, 993 (5th Cir.1984); *O'Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir.1982), *cert. denied*, 465 U.S. 1013, 104 S.Ct. 1015, 79 L.Ed.2d 245 (1984); *Ruiz v. Estelle*, 666 F.2d 854, 856 (5th Cir.1982).

In a capital case "while the movant need not always show a probability of success on the merits, he must present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities [i.e. the other three factors] weighs heavily in the favor of granting the stay." *O'Bryan v. McKaskle*, 729 F.2d at 993 (quoting *Ruiz v. Estelle*, 666 F.2d at 856.)

Celestine v. Butler, 823 F.2d 74, 77 (5th Cir.1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 6, 97 L.Ed.2d 796 (1987); *see also Streetman v. Lynaugh*, 835 F.2d 1521, 1524 (5th Cir.1988).

III

[2] The district court rested its stay of execution upon *King v. Lynaugh*, 828 F.2d 257, *reh'g en banc granted*, 828 F.2d 269 (5th Cir.1987), concluding that the panel in *King* had found a constitutional right to inquire into veniremens' understanding of parole. To the extent the district court footed its grant of a stay upon its view that the panel opinion was binding, it was in error. The grant of a rehearing en banc vacates the panel opinion, which

thereafter has no force. The controlling law must be stated without giving effect to that panel opinion. As we will explain, we are not persuaded that Selvage has shown the requisite likelihood of success on this issue.

[3] Before turning to the merits of the claim, we pause to explain that we find no writ abuse in the failure of Selvage to include this claim in his earlier federal habeas petition. The question is whether Selvage withheld the claim "without legal excuse." *Daniels v. Blackburn*, 763 F.2d 705, 707 (5th Cir.1985).

> Legal excuse exists if "new claims[s] [are] based on facts or legal theories about which [the petitioner] had no knowledge when prosecuting his prior habeas petition." . . . "A petitioner can prove that he has not abused the writ by showing, for example, [that] new facts have arisen since his prior petition, or that the law has changed in some substantive manner in the interim."

Id. (citations omitted).

The legal basis for the argument that Selvage was denied a constitutional right to inquire into the veniremens' understanding of parole enjoyed virtually no support in this circuit before the panel opinion in *King v. Lynaugh*, issued approximately six years after his trial and after our decision affirming the denial of his first federal petition for habeas relief. *King*, although short lived, presented a significant change in our circuit's law. We are persuaded then that this claim should not be dismissed for abuse of the writ; or in any event, that Selvage has a likelihood of avoiding the state's charge of writ abuse. It follows that whether this claim will support a stay

requires that we ask whether the accused restriction on voir dire presents a serious question under our law.

We are not persuaded that a substantial legal question is presented. In *Milton v. Procunier*, 744 F.2d 1091 (5th Cir.1984), *cert. denied*, 471 U.S. 1030, 105 S.Ct. 2050, 85 L.Ed.2d 323 (1985), we considered the type of information about post-sentence relief a defendant is entitled to have explained to the jury. The state trial judge in *Milton* gave a pattern instruction not to consider possible action by the Board of Pardons and Paroles or the governor or to consider how long the defendant would be required to serve. We observed that the instruction "to some degree narrows the inquiry into future dangerousness. It is the obverse of *Ramos*." 744 F.2d at 1100 n.10.[1] Under Texas law a jury may not consider the possibility of parole in its deliberation. We have rejected the assertion that this Texas rule is unconstitutional. *O'Bryan v. Estelle*, 714 F.2d 365, 388-89 (5th Cir.1983), *cert. denied*, 465 U.S. 1013, 104 S.Ct. 1015-16, 79 L.Ed.2d 245 (1984).

If the Texas practice of instructing juries not to consider the effect of parole is sound the refusal to explore veniremens' "understanding" of the subject is an a fortiori case. The point is that the inquiry into parole matters in the selection of a jury cannot be required so long as the state may instruct the selected jury that it cannot consider the subject at all. A contrary assertion borders on the frivolous.

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[1] *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983)(the Briggs instruction).

The decision of the Supreme Court in *Turner v. Murray*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986) is not to the contrary. In *Turner*, the Court held that a capital defendant accused of an interracial crime may on voir dire have the veniremen told the race of the victim and questioned about racial bias. The court observed that in such cases "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." *Id.*, 106 S.Ct. at 1687. The Court plainly acted upon the reality of the significant risk of racial bias that could infect the entire proceedings. The Court also has made plain that its efforts to excise racial bias is driven by intrinsic as well as instrumental concerns about accurate decisionmaking. *Palmore v. Sidoti*, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984). Of course, Turner was entitled to a jury instruction that the race of the victim and the defendant would not be considered.

[4] In sum, *Turner* is inapposite, and in the face of our controlling cases we cannot conclude that refusing to examine veniremen about their understanding of parole or their understanding of a life sentence, a subject they later will be told they are not to consider at all, denied Selvage any right secured by the Constitution.

IV

Selvage next quarrels with the admission of "unadjudicated crime evidence during the penalty phase" of his trial. At the penalty phase, the court admitted the state's offer of two prior federal convictions – possession of a

controlled substance and conspiracy to commit bank robbery. In addition, the state offered the testimony of a New Orleans police officer that Selvage had attempted to escape from a Louisiana state institution, injuring himself in the process. The state also produced two witnesses whose testimony at the penalty phase implicated Selvage in a July 6, 1979, robbery and murder at a convenience store. The store clerk testified that Selvage and an accomplice had demanded money from the register and ordered the clerk to a back room. After hearing gunshots, the clerk returned from the back room to find a customer who had been shot. That testimony was corroborated by a customer who had accompanied the customer who was killed.

[5] Selvage contends that admission of this evidence rendered his sentence unreliable and unfair, that because he was not convicted he is presumed innocent of these crimes, and that the jury never was told that before it could consider this evidence, it had to be persuaded beyond a reasonable doubt that he was guilty of the offenses. The state points out that no objection to admission of this evidence was made at trial, and that both the state trial and appellate courts had relied upon the failure to object as a procedural bar. It follows that this claim must be tested under the procedural default doctrine of *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), and *Engle v. Issac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). That is, Selvage must show legal excuse – good cause for the default and resulting prejudice. Selvage, however, makes no such showing, and we find in the record no justification for his failure to object. Thus, his objection is procedurally barred.

[6] In any event, we are persuaded that the state's evidence was admissible at the penalty phase and denied Selvage no right due him. This evidence was admitted only in the punishment phase and thus did not risk an erroneous finding of guild. Furthermore, at the penalty phase, the jury must consider the issue of the future dangerousness of Selvage, and this evidence was directly relevant to that inquiry. Indeed, in *Barefoot v. Estelle,* the Supreme Court rejected the argument that psychiatric testimony regarding future dangerousness was too unreliable. The Court pointed out that testimony by psychiatrists undoubtedly increased the likelihood of the death sentence, but rejecting the evidence on that basis would undermine *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). *See Barefoot v. Estelle*, 463 U.S. 880, 896-98, 103 S.Ct. 3383, 3396-97, 77 L.Ed.2d 1090 (1983); *see also Williams V. Lynaugh*, 814 F.2d 205 (5th Cir.) *cert. denied*, ___ U.S. ___, 108 S.Ct. 311, 98 L.Ed.2d 270 (1987); *Milton v. Procunier*, 744 F.2d at 1097.

V

[7,8] Selvage next argues that the Texas capital sentencing procedure prevents the jury's consideration of mitigating evidence. We are not persuaded that Selvage has a likelihood of succeeding on this claim. Selvage's first difficulty is that he did not object to the court's charge at the punishment phase of the trial; he requested no instruction on mitigating evidence, and did not otherwise question the capital sentencing structure on the grounds he now urges. *Ex Parte Selvage*, No. 16, 884-02 (March 21, 1988). Of course, a federal habeas court cannot review a claimed error in the conduct of a state criminal

trial when the state has refused review in reliance on its contemporaneous objection rule, absent cause and prejudice for failure to object. We find no legal cause for the absence of objection.

Approximately a month before Selvage's trial, the Texas Court of Criminal Appeals rejected a similar if not identical argument and the Supreme Court had not acted on the petition for certiorari in that case. *Quinones v. State*, 592 S.W.2d 933 (Tex.Crim.App.), *Cert. denied*, 449 U.S. 893, 101 S.Ct. 256, 66 L.Ed.2d 121 (1980). It follows that the issue is not a recently found legal theory not knowable by competent trial counsel. *Reed v. Ross*, 468 U.S. 1, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984) (so novel that its legal basis is not reasonably available). Nor is its rejection by the Texas Court of Criminal Appeals a legal excuse for not objecting. "If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim." *Engle v. Isaac*, 456 U.S. 107, 131, 102 S.Ct.1558, 1573, 71 L.Ed.2d 783 (1982). It is true that the Texas statute had been upheld in *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *see also Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). In *Jurek*, five years before Selvage's trial, the Court observed that "[i]t is as yet undetermined whether or not the jury's consideration of those questions would properly include consideration of mitigating circumstances. . . . We cannot . . . construe the statute; that power is reserved to the Texas courts." *Jurek*, 428 U.S. at 272 n. 7, 96 S.Ct. at 2956 n. 7. We cannot read these cases to so foreclose Selvage's argument that his counsel should not have preserved the point. Finally, it is no

answer that "counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it. . . ." *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986).

Second, even if Selvage could elude the procedural hurdle, we must ask whether he has presented a serious legal question. Selvage relies upon the granting of certiorari in *Franklin v. Lynaugh*, ___ U.S. ___, 108 S.Ct. 221, 98 L.Ed.2d 180 (1987), as well as our recent discussion of the issue in *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir.1987). The Supreme Court granted certiorari in *Franklin* to consider "[w]hether the jury must be instructed on the effect of mitigating evidence under the Texas capital punishment scheme." In *Williams v. Lynaugh*, 837 F.2d 1294, 1295-96 (5th Cir. 1988), we refused to stay an execution pending decision by the Supreme Court in *Franklin v. Lynaugh*, 823 F.2d 98 (5th Cir.), *cert. granted*, ___ U.S. ___, 108 S.Ct. 221, 98 L.Ed.2d 180 (1987), and the Supreme Court in turn granted the requested stay on February 10, 1988. *See Williams v. Lynaugh*, ___ U.S. ___ , 108 S.Ct. 1000, 98 L.Ed.2d 967 (1988).

It is argued that the stay by the Supreme Court in *Williams* explicitly rejected our conclusion in *Williams* that the *Franklin* issue did not present a "substantial case on the merits involving a serious legal question." *Williams v. Lynaugh*, 837 F.2d 1294, 1298 (5th Cir.1988). Pointing to *Barefoot v. Estelle*, 463 U.S. 880, 895, 103 S.Ct. 3383, 3395, 77 L.Ed.2d 1090 (1983), the argument continues that this follows because the Supreme Court will not grant a stay of execution unless there is, inter alia, "a significant possibility of reversal of the lower court's decision. . . ."

[9] The argument has considerable force, but we have not concluded that a grant of certiorari necessarily warrants a stay. We have adhered to the rule that panels will decide death penalty cases by application of controlling circuit precedent;[2] that precedent is that the Texas statute is constitutional. *Penry v. Lynaugh*, 832 F.2d at 926; *see also Streetman v. Lynaugh*, 835 F.2d 1519 (5th Cir.) *stay denied*, ___ U.S. ___ , 108 S.Ct. 588, 98 L.Ed.2d 634 (1988); *cf. Johnson v. McCotter*, 804 F.2d 300 (5th Cir.1986).

We would find it even more difficult rationally to order outcomes if we were required to guess the meaning of unexplained grants of a stay or writs of certiorari. Rather, we apply the settled law of our circuit until it is changed by our court or the Supreme Court has plainly signaled a change. A brief review of the cases in which the Supreme Court has granted requests for stays and petitions for writs of certiorari explain our sense that abiding out settled view of the law until told to do otherwise best strikes for rational and evenhanded justice. We agree that the grant of stay in *Williams* suggests that the Supreme Court may disagree with this court's assessment of the *Franklin* issue. But this is not the kind of plain disagreement with our law that ought to gird our grant of a stay in the teeth of our own decisions.

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[2] "In the absence of declaration by the Supreme Court that executions should be stayed in cases presenting the issue raised by Wicker, we must follow our circuit's precedents and deny both a certificate of probable cause and a stay of execution on this issue." *Wicker v. McCotter*, 798 F.2d 155, 157-58 (5th Cir.1986).

Yet, there is an additional circumstance that weighs in favor of Selvage. We ourselves have questioned our treatment of the *Franklin* issue. *Penry v. Lynaugh*, 832 F.2d 915 (1987). The grant of certiorari in *Franklin* effectively halted any reconsideration of the issue by our en banc court. In these circumstances the execution of a death sentenced prisoner with a properly preserved and potentially valid *Franklin* claim should be stayed. Our rejection of a stay on this claim then rests only upon Selvage's failure to object to the instruction at the punishment phase or to request additional instruction.

VI

Finally, Selvage contends that he suffered from ineffective assistance of counsel. As we understand Selvage's argument, it is that the state's process at the penalty phase denies his counsel the opportunity to provide effective counsel. This claim must fail for the reasons that the premise upon which it rests has been rejected.

Insofar as Selvage attempts to rely upon ineffective assistance of counsel as measured by *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), he must affirmatively demonstrate prejudice. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). Selvage's counsel, John Crow, filed an affidavit. Crow asserts that he decided not to investigate Selvage's mental background, the asserted failure, because as he saw it, the state's rebuttal evidence would turn Selvage's mitigating evidence against him on the question of future dangerousness. We are left with a claim of ineffectiveness that is no more than a variation of the *Franklin* claim.

VII

Our decision to vacate this stay then rests only upon Selvage's failure to object and the state court's reliance upon Texas' contemporaneous objection rule. We are presented with no claim of factual innocence and under *Engle v. Isaac*, we find no legal excuse. We therefore vacate the stay of execution granted by the district court and deny Selvage's request for stay pending his appeal of the claims dismissed by the district court and for a certificate of probable cause pending appeal.

SUPREME COURT OF THE UNITED STATES

No. 87-6700

John Henry Selvage,
Petitioner

v.

James A. Lynaugh, Director, Texas Department of Corrections

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 1 presented by the petition, but rephrased as follows: "At the time petitioner was tried, was there 'cause' for not raising a claim based upon arguments later accepted in *Penry v. Lynaugh*, No. 87-1677 (June 26, 1989); and if not, would the application of a procedural bar to the claim result in a 'fundamental miscarriage of justice,' *Smith v. Murray*, 477 U.S. 478 (1986)?"

October 10, 1989